FILED

No. 97-252 AUG 7 1997

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In The

Supreme Court of the United States

October Term, 1996

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Petitioner,

vs.

RICHARD B. PFEIL and MARY JOAN PFEIL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals has so far departed from the fair process of decisionmaking guaranteed by the Due Process Clause of the Fifth Amendment as to call for an exercise of this Court's supervisory power where the Court of Appeals concluded that petitioner's partition action was barred by the equitable doctrine of laches, without actually considering the evidence and argument he had presented on that and integrally-related issues of adverse possession and title by limitation or the fundamental principle of equity jurisprudence that "equity follows the law," and then affirmed the summary judgment entered against him.

Whether this Court should exercise its supervisory powers to define the fundamental requirements that should be observed by the Courts of Appeals in ruling on petitions for rehearing filed pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure and settle, among other things, the nature and legal bounds of any discretion the Courts of Appeals may have to reject petitions for rehearing which bring to the panel's attention points of law or fact that it may have overlooked.

Whether this Court should exercise its supervisory powers where the panel which decided petitioner's appeal refused to consider a mandamus petition asking the Court of Appeals to compel compliance with the Fifth Amendment's Due Process Clause, which it construed as a successive petition for rehearing and prevented petitioner's suggestion for *in banc* consideration of constitutional and jurisdictional issues his mandamus petition raised from being circulated to the full court.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered January 22, 1997. The panel denied a timely-filed petition for rehearing on March 10, 1997 (App. B). On May 23, 1997, the Court granted petitioner's application and extended the time within which he could file a petition for a writ of certiorari to and including August 7, 1997. On June 9, 1997, the panel denied the mandamus petition petitioner filed on May 27, 1997, after construing it as a successive petition for rehearing, and found a contemporaneously-filed suggestion for in banc consideration of the mandamus petition to be untimely.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> nor shall any person . . . be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

"Summer Hillside," an oil by the American Impressionist, Theodore Robinson, was one of a number of paintings which Hamline Robinson inherited when his brother, the artist, died in 1896. Upon Hamline Robinson's death, intestate, in 1907, his widow and two daughters inherited the paintings, as cotenants, by operation of Missouri law, *i.e.*, each heir had an undivided one-third interest in the entire collection.

In 1912, Florence Robinson, Hamline's widow and former administratrix of his estate, sold "Summer Hillside" and twelve other paintings that were unadministered assets of his estate to New York art dealer William Macbeth.[1] Her younger daughter, Fonnie Hutchinson, who lived in California, never learned of the 1912 sale, nor did Fonnie's son, Robert W. Hutchinson.

In April 1992, while reviewing microfilm of the Macbeth Gallery records, the sister of petitioner Thomas R. Hutchinson discovered information indicating that their great grandmother had sold "Summer Hillside" to William Macbeth.[2] On July 22, they learned that Richard and Mary Jo Pfeil claimed to own that painting[3] and that it would be exhibited in Tulsa that fall.

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1. Events surrounding this sale, which took place in Indiana, are memorialized in business records Macbeth Gallery gave to the Archives of American Art, a branch of the Smithsonian Institution.

2. Macbeth concealed this information after he purchased "Summer Hillside." The identity of the seller was also concealed by Macbeth's nephew, when he provided curator John I.H. Baur other information about that painting so it could be included in a catalogue which The Brooklyn Museum published in 1946, in conjunction with a retrospective exhibition of Robinson's work. This catalogue is now touted as one of two "standard works" on Theodore Robinson.

3. The Pfeils bought "Summer Hillside" at a 1986 auction in New York, (Cont'd)

On November 30, 1992, Hutchinson filed his action for partition of "Summer Hillside" and a judgment declaring that his father's estate had an undivided one-third interest in that painting. The district court's jurisdiction was invoked under 28 U.S.C. § 1332(a), by virtue of the parties' diverse citizenship — Hutchinson was a citizen of Washington state and the Pfeils were citizens of Florida, and the amount in controversy's exceeding $50,000, exclusive of costs and interest.

In their answer, the Pfeils denied that Hamline or Florence Robinson ever owned "Summer Hillside" and raised limitations, laches, and adverse possession as affirmative defenses. Later, when the Pfeils moved for summary judgment, no attempt was made to prove that they or their predecessors-in-interest had acquired Fonnie or Robert Hutchinson's title to the painting by limitation, *i.e.*, adverse possession for the statutory period. Instead, the Pfeils relied on the Macbeth Gallery records Anne Hutchinson had discovered to support their argument that the widow's sale of "Summer Hillside" to Macbeth ousted Fonnie of any interest she had in the painting and that Hutchinson's partition action was barred by the forum's two year statute of limitations, laches, collateral estoppel, and equitable estoppel.

The trial court did not address or decide the Pfeils' unpled estoppel defenses, but concluded that Hutchinson's claims were barred by limitations and laches, and then entered summary judgment in the Pfeils' favor.

(Cont'd)

after Mr. Pfeil saw a color reproduction on the cover of the Sotheby's sales catalogue. He discussed the provenance of "Summer Hillside" with an art dealer before authorizing him to bid $522,500 for the oil. Although the sales catalogue contained an express disclaimer of warranties of provenances and he knew of the twenty-two year gap between the artist's death and the date Macbeth Gallery sold the painting, Mr. Pfeil did not inquire about the source of Macbeth's title.

On appeal, Hutchinson argued that his partition action was not barred by limitations or laches. Among the arguments made in his opening brief are those quoted below:

> After the Pfeils abandoned their adverse possession defense, summary judgment could be entered against Hutchinson if, but only if, the judge did not apply the substantive law correctly. Whether he looked to cases from other jurisdictions, sections of Title 60 of the Oklahoma statutes cited above, or *Bevan v. Shelton*, 469 P.2d 245 (Okla. 1970), the judge had but one decision to make, the Pfeils and Hutchinson hold title to "Summer Hillside" as cotenants.
>
> The parties in *Bevan*, as here, were cotenants; each had an undivided one-third interest in land. Plaintiffs were the daughters of defendant who occupied the property with his second wife by way of his homestead right. The daughters brought an action to adjudicate their interests after their father failed to pay taxes, then repurchased the land after a tax sale. On appeal, the court held that the action was not barred by limitations or laches, absent evidence that the daughters knew that their father was holding the land adversely to their interests. *See Bevan*, 469 P.2d at 249-50.

In addition to citing Indiana, Missouri, Oklahoma, and New York statutes and case law, which supported his position on the Pfeils' affirmative defense of laches, in his appellate briefs, Hutchinson directed the Court of Appeals' attention to relevant evidence in the record.

Purporting to apply Oklahoma law, but saying nothing of the Oklahoma Supreme Court's decision in *Bevan v. Shelton* regarding laches in a cotenancy context, the Tenth Circuit panel affirmed the district court's judgment on the sole ground that Hutchinson's partition action was barred by laches. The panel then said, by way of explanation, that it "need not consider" the limitations/adverse possession issue or the estoppel defenses which the Pfeils had reurged on appeal. *See Hutchinson v. Pfeil*, 105 F.3d at 565 (App. A at 5a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE FAIR PROCESS OF DECISIONMAKING GUARANTEED BY THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

"[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitution and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Whether the Court of Appeals placed any value on Hutchinson's rights, as a cotenant, to enjoy what, by law, was his when he filed his partition action is drawn into question by actions the three-judge panel took and failed to take when he sought protection for those rights. First, when he invoked the jurisdiction of the Court of Appeals; next, when he filed his petition for rehearing; and finally, when he filed a petition for a writ of mandamus and a suggestion for *in banc* consideration of the constitutional and jurisdictional issues which his mandamus

petition raised. The reason for this is that government actions responsible for mistaken, if not arbitrary, deprivation of property in the case *sub judice* are the actions of Federal judges, not agents of state government authorized, by statute, to seize property in the possession of one person upon application of another, as was the case in *Fuentes v. Shevin.*

A. The Court of Appeals had a plainly defined and peremptory duty under the Due Process Clause of the Fifth Amendment to actually consider the evidence and arguments Hutchinson presented.

While "due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972), "the opportunity to be heard [must be] 'at a meaningful time and in a meaningful manner,' " *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)), as well as "appropriate to the nature of the case," *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)).

In judicial proceedings, "[t]he opportunity to be heard is an essential requisite of due process of law." *Richards v. Jefferson County, Ala.,* 116 S. Ct. 1761, 1765 n.4, 135 L. Ed. 2d 76, 83 n.4 (1996). The critical requirement, however, is that "[t]he one who decides *must hear.*" *See Morgan v. United States,* 298 U.S. 468, 481 (1936) (emphasis added). The fact that a litigant "has an opportunity to speak up" is meaningless, unless the decisionmaker "must listen to what he has to say," *Fuentes v. Shevin,* 407 U.S. at 81. Therefore, in adjudicative proceedings, due process "requires that the decisionmaker *actually consider* the evidence and argument that a party presents." *de la Llana-Castellon v. Immigration and Naturalization Serv.,* 16 F.3d 1093, 1096 (10th Cir. 1994) (emphasis added) (citing *Morgan v. United States,* 298 U.S. 468, 481 (1936)).

Those who sit as decisionmakers in federal agencies and trial courts are not the only ones who "must hear." The Court of Appeals is also bound to afford those invoking its jurisdiction "a fair opportunity to obtain an adjudication on the merits of [their] appeal[s]," *Evitts v. Lucey,* 469 U.S. 387, 405 (1985).

B. Hutchinson was denied procedural "due process" when the panel held that his partition action was barred by laches, without considering arguments and evidence he presented, and was mistakenly deprived of his property interests.

"To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process." *Watson v. University of Utah Med. Center,* 75 F.3d 569, 577 (10th Cir. 1996) (internal quotation marks omitted).

1. Hutchinson possesses protected property interests in "Summer Hillside" and other paintings which Macbeth bought in 1912.

a. Hutchinson's legal rights are clearly defined and fixed by law.

Hutchinson's title and undivided one-third interest in "Summer Hillside" and other paintings Hamline's widow sold to Macbeth were fixed by statutes of intestate succession in force at the time and place Hamline Robinson and Hutchinson's paternal grandparents died.[4] His rights in those paintings are clearly defined by Missouri, California, and Indiana[5] law.

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4. *See* Mo. Rev. Stat. §§ 306, 323 (1955 versions at Mo. Rev. Stat. §§ 468.010, 469.070); Cal. Prob. Code §§ 220-222.

5. Because Hutchinson and the Pfeils claim title to "Summer Hillside" (Cont'd)

These vested rights establish, for due process purposes, that Hutchinson has three distinct property interests in the paintings Macbeth bought. First, his retaining title to and ownership of those thirteen paintings. *See United States v. One Tract of Real Property with Buildings, Appurtenances, and Improvements Thereto, Located in Robeson, N.C.*, 803 F. Supp. 1080, 1082 (E.D. N.C. 1992) (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972), and *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989)). Second, his having the right, as a cotenant, to possess, use, and enjoy the paintings. *Id.* Third, his action for partition of "Summer Hillside" and similar actions for partition of the other paintings.[6] *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (in *Mullane*, "the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"). Because these interests were to be affected by proceedings in the Court of Appeals, Hutchinson was entitled to procedural due process.[7]

(Cont'd)

from a common source, *i.e.*, Hamline Robinson, and their title accrued under the same Missouri succession statutes, the Pfeils had to bring forward "any other or superior title, or a title adverse to that under which [Hutchinson] claims," *Millis v. Roof*, 121 Ind. 360, 23 N.E. 255, 256 (1890), and produce evidence supporting such a superior or adverse title, to prevail on Hutchinson's partition action. By law, neither the Pfeils nor Hutchinson can deny each other's title because each claims from a common source. *Id.*

6. When actions for partition of other paintings sold in 1912 are filed, collateral estoppel is surely to be raised as an affirmative defense. Unless Hutchinson obtains the relief he seeks by way of this Petition and a contemporaneously-filed Petition for Writ of Mandamus (*see In re Hutchinson*, No. _____), he will be forced to litigate the fourth element of that defense — whether he had a full and fair opportunity to obtain an adjudication on the merits of his appeal in this case, time and again. *See, e.g., Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992).

7. Due process is triggered when property rights "are to be affected" by a government proceeding. *See Fuentes*, 407 U.S. at 80.

As the Court noted, years after it decided *Fuentes v. Shevin*:

> The purpose of this requirement is not only *to ensure abstract fair play to the individual.* Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — *to minimize substantively unfair or mistaken deprivations of property.*

See James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (citing and quoting *Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972) (emphasis added).

The situation presented in this case is quite different from that before this Court in *Fuentes v. Shevin.* In *Fuentes,* state agents, acting under Florida and Pennsylvania replevin statutes, had seized property in the possession of one person upon the application of another. Here, Hutchinson and the Pfeils stood on an equal footing when suit was filed. As cotenants, each had ownership and possessory rights in "Summer Hillside" and the absolute right to seek judicial partition of that painting.[8]

Rather than enforcing that right by exercising their equity powers, four Article III judges, acting as agents of the Federal government, effectively destroyed a right created by law, *i.e.*, Hutchinson's right to acquire property by descent, when they determined that his partition action was barred by laches.[9] At the same time, those jurists created rights in the Pfeils which they had not acquired, under section 2-403(1) of New York's Uniform Commercial Code, when they bought the painting in

8. *See* discussion on pages 10-11, *infra.*

9. This subject and its relationship to the due process issue is discussed at length on pages 12-17, *infra.*

1986, *i.e.*, the two-thirds interest in "Summer Hillside" inherited by Hamline Robinson's daughters. *But see Bruns v. Cope*, 182 Ind. 289, 105 N.E. 471, 473 (1914) (the equitable doctrine of laches cannot be used to destroy rights created by law, including the right to acquire property by descent); *Seifert v. Seifert*, 708 S.W. 2d 150, 156 (Mo. App. 1985) (no maxim of equity may be invoked to destroy existing legal right nor may equity purport to establish a right that does not exist); *National Trailer v. Convoy v. Oklahoma Turnpike Auth.*, 434 P.2d 238, 241 (Okla. 1967) (equity is without power to change rights established by law or to create a right where none exists).

2. The "hearing" afforded Hutchinson was not appropriate to the nature of the case.

To satisfy the Fifth Amendment's due process requirement, the hearing which the Court of Appeals afforded Hutchinson had to be "appropriate to the nature of the case." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 542. From the analysis which follows, it should be clear that no hearing could have been more inappropriate "to the nature of" Hutchinson's action than the "hearing" he was given.

a. Equity has exclusive jurisdiction of actions for partition of personal property.

Partition is a proceeding to enforce a right to division of property and to have shares set off in severalty. *Pavy v. Pavy*, 121 Ind. App. 194, 98 N.E. 2d 224, 226 (1951). Cotenants of personalty, like Hutchinson and the Pfeils, have an "absolute right" to seek partition in a court of equity. *See Julian v. Yeoman*, 25 Okla. 448, 106 P. 956, 956, 957 (1910); *accord, Willard v. Willard*, 145 U.S. 116, 120 (1892). A court of equity is competent to give relief in such cases by decreeing partition of the commonly-owned property or its sale and a division of the

proceeds where partition is impracticable. *See Julian v. Yeoman,* 106 P. at 957; *Robinson v. Dickey,* 143 Ind. 205, 42 N.E. 679, 681 (1896).

The contours, as well as the scope, of this "absolute right" and how that right can be lost were delineated by the Indiana Supreme Court years before Macbeth traveled to South Bend, Indiana, to buy "Summer Hillside" from Hamline Robinson's widow:

> [T]he right to the partition exists from the date of the tenancy. It may or may not be exercised, in the discretion of the tenants. All the tenants have an equal right to possession, and may all be satisfied to enjoy the estate in common. Partition may not be desired by any one or more of the tenants for a period of time greater than that prescribed by any statute of limitation; and the fact that such a period is suffered to elapse, does not in any manner affect the right of one or more of the tenants to have partition.

Jenkins v. Dalton, 27 Ind. 78, 81 (1866). However, when one cotenant holds possession to the exclusion of the others, claiming to own the whole, and holding it adversely[10] to the other cotenants for the time prescribed by the applicable statute of limitations (*i.e.*, fifteen years at the time of the 1912 sale), then an action for partition by a cotenant out of possession would be barred. *See Peden v. Cavins,* 134 Ind. 493, 34 N.E. 7, 8 (1892).

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10. "[P]ossession, to give title, must be adversary." *Kirk v. Smith,* 22 U.S. (9 Wheat.) 241, 288 (1824). Therefore, whenever title to commonly-owned property is at issue, adverse possession is the determining factor, not whether a cotenant out of possession, such as Fonnie Hutchinson, might have discovered, upon returning to Missouri to attend her mother's funeral, that one or more paintings which were unadministered assets of her father's estate were missing. *But see Hutchinson v. Pfeil,* 105 F.3d at 564 (App. A at 4a).

(1) The equitable maxim "equity follows the law" controlled Hutchinson's partition action.

A fundamental principle of equity jurisprudence is that "equity follows the law." *See Hedges v. Dixon County,* 150 U.S. 182, 192 (1893). This maxim was characterized as a postulate or legal truism, admitting of no dispute, in *Magniac v. Thomson,* 56 U.S. (15 How. 281, 299) 515, 520 (1853). When applied, it places well-defined limits on a court's equity powers and makes it clear that where legal rights are involved, equity is *subordinate to* the law:

> [W]herever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim equitas sequitur legem is strictly applicable.
>
> . . .
>
> [T]o abrogate or to assail a perfect and independent legal right, [equity] can have no pretension. In all such instances, equity must follow, or in other words, be subordinate to the law.

Magniac v. Thomson, 56 U.S. (15 How. at 302) at 523; *accord, Chickasaw Tel. Co. v. Drabek,* 921 P.2d 333, 335 n.7 (Okla. 1996).

When the Supreme Court of Missouri[11] discussed this

11. Missouri is the state whose statutes of intestate succession created rights Hutchinson sought to enforce in his partition action and the state where Hamline Robinson's widow died in 1927.

principle in *Milgram v. Jiffy Equipment Co.*, 362 Mo. 1194, 247 S.W. 2d 668 (1952), it spoke in terms of a court's exercising equity powers, rather than equity as a body of law. What it said is, in effect, a caveat directed to trial courts sitting in that state and other courts required to apply Missouri law:

> *A court of equity, no more than a court of law may act upon its own conceptions of what is right in a particular case,* for established rules and precedents are equally binding upon both law and equity courts; and where the rights of parties litigant are clearly defined by statutes, legal principles and precedents those statutes and legal principles may not be unsettled or ignored. *And not even a court of equity has any discretion as to what the law may be.*

247 S.W. 2d at 676 (citations omitted) (emphasis added).

(2) The panel acted upon its own conceptions of what was right rather than recognizing that, as a court of equity, it had no power to alter or ignore the parties' legal rights.

Because equity has exclusive jurisdiction of suits for partition of personalty, *Robinson v. Dickey,* 42 N.E. at 680; *Julian v. Yeoman,* 106 P. at 957, the trial court sat as an equity court exercising equity powers in Hutchinson's partition action.

When the appellate panel was asked to conduct a *de novo* review of the district court's summary judgment ruling, it too was exercising equity powers. For that reason, Hutchinson's appeal should have been controlled by equitable principles, including the maxim *equitas sequitur legem. Cf. Burchfield v.*

Bevans, 242 F.2d 239, 241 (10th Cir. 1957) (because an interpleader action is equitable in nature, it is controlled by equitable principles; of course, equity will follow the law).

It was inappropriate, as a matter of constitutional law and equity jurisprudence, for the panel to: (1) ignore statutes, legal principles, and precedents which defined the parties' rights and which Hutchinson cited in his briefs; (2) fail to consider the question of title by limitation; and (3) invoke the equitable doctrine of laches to destroy Hutchinson's legal rights in the commonly-owned property, while enlarging those of the Pfeils. Not even a Federal appellate court, exercising equity powers, "has any discretion as to what the law may be." *See Milgram v. Jiffy Equip. Co.*, 247 S.W. 2d at 676; *see also Phelan v. Roberts*, 182 Okla. 202, 77 P.2d 9, 12 (1938). Nor may it "act upon its own conceptions of what is right in a particular case." *See Milgram*, 247 S.W. 2d at 676. That, however, is precisely what the Court of Appeals did in Hutchinson's case.

Had the decisionmakers considered Hutchinson's evidence and argument and provided him a hearing "appropriate to the nature of the case," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 542, *i.e.*, recognized equity was subordinate to the law, they would have satisfied the Fifth Amendment's due process requirements, *see de la Llana-Castellon v. Immigration and Naturalization Serv.*, 16 F.3d at 1096, and not exceeded their equity jurisidiction, *see Magniac v. Thomson*, 56 U.S. (15 How. at 302) at 523. The Court of Appeals would also have fulfilled its duty under the Rules of Decision statute, 28 U.S.C. § 1652, to ascertain and apply the proper state law. *See Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941).

b. The hearing afforded Hutchinson was a hearing in form only.

What the Court of Appeals said in its opinion in this case makes it clear that it never ascertained *or applied* the proper state law and, for that reason, only afforded Hutchinson a *pro forma* hearing:

> Because of [our] conclusion [that the trial court did not err in finding Mr. Hutchinson's claims barred by the doctrine of laches], we *need not consider* the other matters asserted by the Defendants in support of the propriety of the grant of summary judgment in their favor.

Hutchinson v. Pfeil, 105 F.3d at 565 (emphasis added) (App. A at 5a).

With this remark, the panel, sitting as an equity court, closed its doors against Hutchinson, without considering whether the Pfeils or their predecessors-in-interest had acquired his title to "Summer Hillside" by limitation. However, under Oklahoma law, which it viewed as controlling, "Equity follows the law and will never close her doors against the true owner of [property], when the complaint is made within a less time than that in which prescription could have ripened, and where no special circumstances appear demanding an earlier application." *See Phelan v. Roberts,* 182 Okla. 202, 77 P.2d 9, 12 (1938).

In the case of Hutchinson's partition action, where he had a perfect and independent legal right, as a cotenant, to partition or a judicial sale of the commonly-owned property, "equity must follow, or in other words, be subordinate to the law." *Magniac v. Thomson,* 56 U.S. (15 How. at 302) at 523. However, the three-

judge panel which decided Hutchinson's appeal never alluded to, much less applied, "the law" which governed the parties' rights. *But see Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) ("until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court"); *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1476 (10th Cir. 1993) (in diversity actions, the appellate court's role is "to ascertain and apply the proper state law").

Instead, the panel adopted, without authority, arguments the Pfeils made to support their limitations[12] and laches defenses, but admittedly did not consider the evidence and arguments Hutchinson presented on laches or the integrally-related issues of title by limitation and adverse possession. *But cf. Fuentes v. Shevin*, 407 U.S. at 81 (" 'fairness can rarely be obtained by . . . one-sided determination of facts decisive of rights' ") (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123,

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12. The panel's holding that "Florence Robinson's 1912 sale of the painting . . . ousted any interest Mr. Hutchinson would have inherited," *Hutchinson v. Pfeil*, 105 F.3d at 565 (App. A at 5a), can be traced to an argument made to support the Pfeils' limitations defense: "Fonnie Hutchinson [ ] was unequivocally ousted from any interest she may have had to *Summer Hillside* when the painting was sold to William Macbeth in 1912." *See* Appellees' Brief at 33. Because no supporting authority was cited, the argument should have been deemed abandoned. *See Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1134 n.3 (10th Cir. 1994). Instead, the Pfeils' argument is now "the law" in the Tenth Circuit, if not Indiana or New York. *See Sims v. Dame*, 113 Ind. 127, 15 N.E. 217, 219 (1888) (person who purchases from one of two cotenants the interests of both, without other's authority, only acquires seller's interest and becomes the other's cotenant); *Davis v. Lottich*, 46 N.Y. 393, 397 (1871) (if a cotenant in possession of personalty "sells or converts the property, the co-tenant or joint owner may, at his option, have his action for damages for the conversion, or hold his title with the purchaser. He cannot be deprived of his property without his consent or without redress. . . .").

170-72 (1951) (Frankfurter, J., concurring). In the process, Hutchinson was denied procedural due process and mistakenly deprived of his property interests in "Summer Hillside."

If the panel had actually considered Hutchinson's arguments on the limitations/adverse possession and laches issues *before* deciding the laches issue,[13] it would have recognized the importance of the law of cotenancy and applied its unique rules to decide the issues he had presented for review.

Because the fair process of decisionmaking guaranteed by the Due Process Clause was not at work during Hutchinson's appeal, there was nothing to protect him against a mistaken, if not arbitrary, deprivation of property by a panel of judges who acted upon their own conception of what was right in this particular case and who failed to consider, or simply disregarded, *strict limits* placed on their equity powers by the maxim "equity follows the law."

If the fragile values which the Fifth Amendment's Due Process Clause was designed to protect are to be protected, its terms must be given effect. In Hutchinson's case, that can only be done by this Court. By allowing the writ he seeks and exercising its supervisory powers, this Court can make it clear that the Due Process Clause is not "an empty, purposeless form

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13. The panel's decision to affirm the district court's laches ruling, without addressing issues of limitations, adverse possession, and estoppel, may reflect an effort to conserve judicial resources. The United States Constitution, however, "recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

of words," *Western Pacific Railroad Case,* 345 U.S. 247, 272 (1953) (Frankfurter, J., concurring) (construing 28 U.S.C. § 46(c)), even in this age of escalating caseloads and crowded dockets.

II.

THE APPELLATE COURT DECIDED IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OR THAT SHOULD BE, BUT HAVE NOT BEEN, DECIDED BY THIS COURT.

A. Fundamental requirements to be observed in ruling on petitions for rehearing should be defined by this Court.

This Court found, in *Western Pacific Railroad Case,* 345 U.S. 247 (1953), that if 28 U.S.C. § 46(c) was to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals. It also recognized that it had the responsibility, under its general powers to supervise the administration of justice in the federal courts, to define those requirements and insure their observance. 345 U.S. at 260.

Just as the Court exercised its general supervisory powers in *Western Pacific* to decide *en banc* issues, it should invoke those same powers in this case to define the fundamental requirements that should be observed by the Courts of Appeals as they decide approximately 9,000 petitions for rehearing a year.[14] This would assure inter- and intra-circuit uniformity.

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14. Government statistics indicate that 8,823 petitions for rehearing were filed in the Courts of Appeals during the year ending September 30, 1995. *See* U.S. Court of Appeals Summary, *Federal Court Management Statistics* at 27 (U.S. Dept. of Judiciary, 1995).

Where section 46(c) "deals, not with rights, but with power [plus the discretion for its exercise]," *Western Pacific Railroad Case,* 345 U.S. at 259, Rule 40(a) appears to deal, not with power plus the discretion for its exercise, but with the right of litigants to file petitions for rehearing, *United States v. Ali,* 86 F.3d 275, 276 (2d Cir. 1996), if those petitions comply with the rule's time, content, and length requirements.

What has not been, but should be, settled by this Court is the nature and legal bounds of any discretion an appellate panel may have to reject petitions for rehearing which do what they are designed to do — "bring to the panel's attention points of law or fact that it may have overlooked." *Missouri v. Jenkins,* 495 U.S. 33, 46 n.14 (1990) (citing Fed. R. Civ. P. 40(a)).

It is clear, from the Court's prior statements that the panel to which a petition for rehearing is directed "is required to consider [its] contentions." *Id.* What may be unclear to the Courts of Appeals as a whole or certain panels is whether the Court meant to suggest that once a panel "consider[s]" those contentions it is free to reject the petition for a good reason, a bad reason, or no reason at all, when it added the following phrase to the language quoted immediately above: "if only to reject them." *Id.* If petitions for rehearing are addressed to the discretion of the panel, the exercise of that discretion should not be "willful, but [instead] governed and determined by certain well-established principles." *See Railway Register Mfg. Co. v. North Hudson Co.,* 26 F. 411, 412 (C.C.D.N.J. 1885).

As should become clear from the analysis which follows, the panel which denied Hutchinson's petition for rehearing implicitly held that it need not follow standards[15] enunciated in

15. Statements found in several recent opinions indicate that the Tenth Circuit expects counsel to adhere to a single standard when they file petitions (Cont'd)

prior Tenth Circuit decisions. If this is so, how are litigants who appear before that court to understand its practice. *But cf. Western Pacific Railroad Case,* 345 U.S. at 260-261 ("It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice — whatever it may be — whereby the court convenes itself *en banc.*").

In his petition, Hutchinson noted that the panel had not considered or discussed decisive questions legitimately raised in his appellate briefs, *e.g.*, because equity follows the law, laches provides no defense to an action for partition until the cotenant in possession acquires the other cotenant's title by limitation; and there is no record evidence of adverse possession. To support the first of these points, Hutchinson once again cited *Bevan v. Shelton,* 469 P.2d 245 (Okla. 1970). Decisions from other jurisdictions, including *Ashley v. Garrett,* 218 Ark. 126, 234 S.W. 2d 513, 515 (1950); *Harlan v. Douthit,* 379 Ill. 15, 39 N.E. 2d 345, 349-50 (1942); *Clarke v. Clarke,* 349 Ill. 642, 183 N.E. 13, 15-16 (1932); *Gibson v. Gibson,* 205 Iowa 1285, 217 N.W. 852, 855 (1928); and *Cheeks v. Herrington,* 523 So. 2d 1033, 1035-36 (Miss. 1988), were also cited.

The points noted above, without more, should have led the panel to grant Hutchinson's petition for rehearing. *See Foster v. MCI Telecommunications Corp.,* 773 F.2d 1116, 1117 (10th Cir. 1985) (petition for rehearing was granted where it "properly points out that this court failed to address an issue legitimately raised in the briefs"); *Accord, Railway Register Mfg. Co. v. North*

(Cont'd)
for rehearing. Those opinions suggest that that standard is that a "petition for rehearing should not be filed routinely." *See Westcot Corp. v. Edo Corp.,* 857 F.2d 1387, 1388 (10th Cir. 1988) (citing 10th Cir. R. 40.1). However, the rule cited in *Westcot* contains the following statement, in addition to the quoted caveat: "Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court." (App. F at 23a).

Hudson Co., 26 F. 411, 412 (C.C.D.N.J. 1886) (applications for reargument should be granted "upon all allegations that any question decisive of the case, and duly submitted by counsel, has been overlooked by the court"). Instead, Hutchinson's petition was summarily denied. (App. D at 17a).

Other points of law and fact which Hutchinson contended the panel had overlooked pertained to its conclusion that Fonnie Hutchinson should have discovered that Summer Hillside was missing, when her mother died fifteen years after the sale, and taken steps to assert her rights. *See Hutchinson v. Pfeil,* 105 F.3d at 565-66 (App. A at 4a). One point was that the fact of the widow's death, standing alone, is not a circumstance that should have aroused Fonnie's suspicion about a possible breach of trust or "induced inquiry" about commonly-owned property in general or the oil given the title "Summer Hillside" sometime after 1918. *See* Appellant's Petition for Rehearing at 9.

Another point was that even if Fonnie had discovered that the painting she had never known as "Summer Hillside" was no longer in her mother's possession, that fact, without more, would not have enabled her to do what the panel said she should have done, *i.e.*, "taken steps to assert her rights." Hutchinson then argued that where unique and concealed works of art are involved, a plaintiff cannot be said to have discovered his cause of action for partition until he learns enough facts to form its basis, including the fact that the art is being held by another and who, or at least where that other is. *Id.* at 11 (citing *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990) (applying Indiana law in replevin action)). He went on to note that what holds true in Indiana, the state where Macbeth bought "Summer Hillside," is also true in the forum. Under Oklahoma law, the Pfeils had the burden of proving that Hutchinson "had an opportunity to know of the possession of the property by

another and [to assert his rights] before the lapse of time will bar [his] claim to [ ] the property." *Id.* (citing *In re John Deere 4030 Tractor*, 816 P.2d 1126, 1133 (1991) (replevin action to recover stolen tractor). Hutchinson also noted that the Pfeils did not carry this evidentiary burden. *Id.* at 12.

Whether the panel found the contentions in Hutchinson's petition for rehearing legally insufficient is unknown because of the summary denial of his petition. Whether one, two, or all three members of the panel actually considered his contentions before the petition was denied is also an unanswered question. Whether the full panel must consider every such petition is another matter that should be encompassed by any statement of "fundamental requirements" promulgated by this Court

Although this Court has explained what a petition for rehearing is designed to do — "bring to the panel's attention points of law or fact that it may have overlooked," *Missouri v. Jenkins*, 495 U.S. at 46 n.14, it appears not to have described its purpose. Other Federal courts have said that the purpose of such petitions is "to raise some defect in the decision meriting reconsideration," *Clarke v. United States*, 915 F.2d 699, 715 (D.C. Cir. 1990) (dissenting opinion), and, thus, "ensure that the panel properly considered all relevant information in rendering its decision," *Armster v. United States District Court for D. of Alaska*, 806 F.2d 1347, 1356 (9th Cir. 1986).

From a litigant's perspective, the most apt statement of the purpose of petitions for rehearing is that found in *Sharp Electronics Corporation v. Shaw*, 524 So. 2d 586, 587 (Ala. 1987): "*to provide the Court with a final opportunity to see that justice is done.*" (emphasis added). The *Shaw* court then added that it "should stand with an open mind throughout all stages of the appellate process, including the rehearing stage." *Id.* Such a mindset lends itself to acknowledging that the court may have overlooked or misconstrued some point of law or fact.

If this Court determines that the purpose of petitions for rehearing filed in the Court of Appeals is, in fact, to provide those courts with a final opportunity to see that justice is done, that purpose can best be achieved by this Court's defining the fundamental requirements that are to be observed by the Courts of Appeals, and then insuring their observation.

III.

THE PANEL'S DENIAL OF HUTCHINSON'S MANDAMUS PETITION AND ITS REFUSAL TO ALLOW HIS SUGGESTION FOR *IN BANC* CONSIDERATION TO BE TRANSMITTED TO THE FULL COURT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

After his petition for rehearing had been denied, but while the case was still *sub judice*, Hutchinson filed a petition for a writ of mandamus, under 28 U.S.C. § 1651(a), with the Tenth Circuit.[16] In that petition, the Court of Appeals was asked to compel the panel that had decided Hutchinson's appeal to comply with due process requirements of the Fifth Amendment.

Concurrent with the filing of his mandamus petition, Hutchinson filed a suggestion for *in banc* consideration of the constitutional and jurisdictional questions his petition raised. The suggestion contained the expressed belief of counsel, required by Circuit Rule 35.2.2, that the petition involved one or more questions of exceptional importance.

The panel which had decided Hutchinson's appeal

16. Authority for filing such a petition was found in *In re Sealed Cases*, 794 F.2d 749, 750 n.1 (D.C. Cir.1986). In that case, the Court of Appeals noted, in *dictum*, that by filing a mandamus petition with it (rather than in this Court), an appellant could compel it to decide his pending appeal within the thirty day period prescribed by 28 U.S.C. § 1826(b).

"construe[d] the mandamus petition as a petition for rehearing of its previous decision." *See Order* at 1, *In re Hutchinson,* No. 97-5097 (10th Cir. June 16, 1997) (App. B at 9a). It then said, citing Circuit Rule 40.3 (App. F at 23a), "The court will not accept a successive petition for rehearing from any party to an appeal." *Id.*

In ruling as it did, the panel failed to consider express provisions of Rule 2 of the Federal Rules of Appellate Procedure and Circuit Rule 2.1, which allow the requirements or provisions of other rules to be suspended for good cause *sua sponte*. This ruling also conflicts with this Court's decision in *Huddleston v. Dwyer,* 322 U.S. 232, 236-37 (1944). *Huddleston* recognizes that where controlling state law needs to be re-examined and the case is still *sub judice*, it is appropriate for a litigant to file a second petition for rehearing in the Court of Appeals and for the court to consider and grant such petitions.

The panel also found Hutchinson's suggestion for *in banc* consideration of two questions raised by his mandamus petition to be untimely. *See Order* at 1, *In re Hutchinson,* No. 97-5097 (10th Cir. June 16, 1997) (App. B at 9a). Because of this finding and express provisions of Tenth Circuit Rule 35.3 (App. F at 22a), the Suggestion was not transmitted by the clerk to "the judges of the court who are in regular active service," as is required by Rule 35(b) of the Federal Rules of Appellate Procedure. (App. F at 20a). This ruling is at odds with the Court's decision in *Western Pacific Railroad Case,* 345 U.S. at 272, and was the type of decision Justice Frankfurter anticipated when he made the following observations in his concurring opinion. "It may be proper to require petitions for rehearing *en banc* to be made to the panel in the first instance, but to allow the discretionary function under § 46(c) to be discharged definitively by the panel whose judgment may call for *en banc* action is to treat the statute as an empty, purposeless form of words".

Because the panel's rulings on Hutchinson's "successive petition for rehearing" and its refusal to allow his Suggestion for en banc to be circulated to the full court are in conflict with relevant decisions of this Court, the writ should be allowed.

CONCLUSION

For the reasons set forth above, petitioner submits that the Court should exercise its supervisory powers, after allowing the writ petitioner seeks, and then decide the issues presented by this petition.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 22, 1997

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-5031

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff- Appellant,

v.

RICHARD B. PFEIL and MARY JOAN PFEIL

Defendants - Appellees.

SONA JOHNSTON,

Nonparty Witness.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 92-C-1088-E)

Glenn R. Beustring, Glenn R. Beustring and Associates, Tulsa, Oklahoma (Joan Godlove and Todd Alexander, Tulsa, Oklahoma, with him on the briefs), for Plaintiff - Appellant.

Lewis N. Carter, Doerner Saunders, Daniel & Anderson, Tulsa, Oklahoma, for Defendant - Appellee.

Appendix A

James L. Kincaid and Cheryl L. Cooper, Crowe & Dunlevy, Tulsa, Oklahoma, and Barrett W. Freedlander, Weinberg and Green, Baltimore, Maryland, all on the brief for the Nonparty Witness.

Before EBEL, McWILLIAMS and KELLY, Circuit Judges.

KELLY, Circuit Judge.

This dispute arises over the ownership of a painting by the American Impressionist, Theodore Robinson, entitled *Summer Hillside, Giverny.* As personal representative of the estate of his father, Robert W. Hutchinson, Thomas R. Hutchinson brought an action in which he claimed that he was the owner of an undivided one-third interest in the painting. He sought a declaration of his ownership, partition of *Summer Hillside,* and an accounting. Mr. Hutchnson claims his interest in the painting by descent.

The district court granted summary judgment in favor of Defendants Richard and Mary Jo Pfeil. Mr. Hutchinson now appeals, raising five contentions. We have considered all of Mr. Hutchinson's arguments in support of each of his contentions, but discuss only those necessary to our decision.

At oral argument, the issue of whether the district court properly exercised in personam jurisdiction over the Defendants was raised. Although the Defendants argued this issue below, they did not cross-appeal and it consequently has been waived.

Mr. Hutchinson argues that the district court erred in granting summary judgment in favor of the Defendants on the affirmative defense of laches. We review the district court's grant

of summary judgment de novo, applying the same standard used by the district court. *United States v. City & County of Denver*, 100 F. 3d 1509, 1512 (10th Cir. 1996). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P.56(c). A defendant may use a motion for summary judgment to test an affirmative defense which entitles that party to a judgment as a matter of law. The defendant making such a motion must demonstrate that no disputed material fact exists regarding the affirmative defense asserted. *Miller v. Shell Oil* Co., 345 F. 2d 891, 893 (10th Cir.1965); *Zenith Elecs. Corp. v. Panalpina, Inc.*, 68 F. 3d 197, 201 (7th Cir.1995); Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 2734, at 407-11 (2d ed. 1983). If the defendant meets this initial burden, the plaintiff must then demonstrate with specificity the existence of a disputed material fact. If the plaintiff fails to make such a showing, the affirmative defense bars his claim, and the defendant is then entitled to summary judgment as a matter of law. *Miller*, 345 F. 2d at 893.

Whether a claim is barred by laches "must be determined by the facts and circumstances in each case and according to right and justice. Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another." *Preston v. Berry*, 234 P.2d 417, 422 (Okla. 1951) (quoting *American-First Nat'l Bank of Okla. City v. Peterson*, 38 P.2d 957, 958 (Okla. 1934)). In order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by that delay. *Olansen v. Texaco Inc.*, 587 P.2d 976, 985 (Okla. 1978); *see Clark v. Unknown Heirs of Osborn*, 782 P.2d 1384 (Okla. 1989). In determining whether the defendant

is entitled to summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

Mr. Hutchinson claims his one-third interest in *Summer Hillside* through a line of ancestors traceable to the artist. The artist's brother, Hamline Robinson, inherited the painting in 1896 upon the death of the artist. After Hamline died, his estate was probated in Missouri state court; notice to claimants was published in the area newspaper. Hamline's widow, Florence Robinson, and their daughters, Fonnie Hutchinson and Nellie Terhune, each inherited an undivided one-third interest in Hamline's estate, which included *Summer Hillside*. Thus, it is undisputed that Fonnie the ancestor through whom Mr. Hutchinson claims his interest, had notice of her interest in *Summer Hillside* when she inherited that interest from her father in 1907.

In 1912, Florence Robinson sold *Summer Hillside* to an art dealer. We assume for purposes of summary judgment that Fonnie Hutchinson was not aware of her mother's sale of the painting at the time it occurred. By 1927, however, when Florence died, Fonnie had notice that her mother was no longer in possession of the painting. By that time at least, Fonnie should have made inquiry into the absence of the painting and taken steps to assert her rights. The record contains no evidence that she did so. Mr. Hutchinson is now bound by the actions — and the inaction — of his predecessor in interest, who, if she had any claims *to Summer Hillside*, delayed unreasonably in asserting them. *Sautbien v. Keller*, 423 P.2d 447, 451 (Okla. 1967) ("Equity cannot . . . assist plaintiffs to escape from circumstances created by fault of their privies.").

Appendix A

Laches and other defenses designed to bar stale claims recognize the difficulties courts and parties face as time elapses between the litigation and the events at issue. Memories fade; witnesses cannot be located or pass away; documentation becomes inaccessible and more difficult to interpret. When the Defendants purchased the painting in 1986 (although without warranties by the seller), they relied upon an undisputed chain of title which extended back nearly seventy-five years. None of the witnesses with personal knowledge of the events surrounding Florence Robinson's 1912 sale of the painting, which ousted any interest Mr. Hutchinson would have inherited, are alive today. The Defendants have been materially prejudiced by this delay of nearly six decades.

Because there are no disputed material facts regarding the affirmative defense asserted by the Defendants, we conclude that the trial court did not err in finding Mr. Hutchinson's claims barred by the doctrine of laches. Because of this conclusion, we need not consider the other matters asserted by the Defendants in support of the propriety of the grant of summary judgment in their favor.

Mr. Hutchinson next contests the denial of his motion to disqualify counsel for the Defendants. He argues that this motion was one for contempt, which is beyond the authority of the magistrate judge to consider. We conclude, however, that the motion was simply a request for a sanction, *cf. Erickson v. Newmar Corp.*, 87 F. 3d 298, 303 (9th Cir. 1996), which is among the nondispositive matters which a magistrate judge may decide. 28 U.S.C. § 636(b)(1)(A). The magistrate judge's denial of the Plaintiff's motion to disqualify the Defendants' counsel was reviewed by the district court and affirmed. We find no merit to the Plaintiff's argument, which is based solely upon instances

in which the Defendants' counsel took positions contrary to those taken by the Plaintiff's counsel. Defendants' counsel did no more than what they are entitled and required to do — zealously represent their clients by advancing arguments and factual interpretations favorable to their clients. *E.g.*, Okla. Rules of Prof. Conduct, preamble at 962 (West 1996). The record contains no evidence that Defendants' counsel at any time lied to the court or committed any other violation of the rules of professional conduct.

Mr. Hutchinson also questions the district court's denial of his motion for recusal of the district judge. He does not allege any extrajudicial activity by the judge, but argues that the judge ignored facts which allegedly demonstrate a lack of impartiality. The district judge did not ignore Plaintiff's arguments — he found them insufficient. We likewise find that Mr. Hutchinson's argument is without merit, and that the district court did not abuse its discretion in denying the recusal motion.

Mr. Hutchinson's two remaining contentions concern matters that the district court did not decide but which are collateral to the merits of his claim of ownership of the painting and thus do not affect the finality of the judgment. *Cooper v. Salomon Bros.*, 1 F.3d 82, 84 (2d Cir. 1993) (lack of jurisdiction over a collateral issue does not deprive the appellate court of jurisdiction over decisions of the district court which are final), *cert. denied*, 510 U.S. 1063 (1994); *cf. Utah Women's Clinic v. Leavitt*, 75 F.3d 564, 567(10th Cir.1995) (an unresolved collateral issue regarding the amount of attorney's fees and costs did not prevent the judgment on the merits from being final) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)), *cert. denied*, 116 S. Ct. 2551 (1996). Because the district court has not yet ruled on Mr. Hutchinson's objections, we have

no jurisdiction over these issues. We note, however, that the absence of a ruling by the district court on these issues does not destroy the finality of the district court's judgment on the merits nor our jurisdiction over issues upon which the district court has ruled. *Cooper,* 1 F. 3d at 84-85.

The first of the two issues upon which the district court has not yet ruled pertains to the magistrate judge's imposition of sanctions under Rule 37(a)(4) for discovery abuse. Discovery is a nondispositive matter, and magistrate judges have the authority to order discovery sanctions. 28 U.S.C. § 636(b)(l)(A); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988). After the magistrate judge imposed the sanctions, Mr. Hutchinson sought reconsideration as required by 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a). Review of the magistrate judge's ruling is required by the district court when a party timely files written objections to that ruling, and the district court must defer to the magistrate judge's ruling unless it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *Grimes v. City & County of San Francisco,* 951 F.2d 236, 240 (9th Cir. 1991). Under § 636(b)(1)(A), a magistrate judge may not issue a final order directly appealable to the court of appeals. *Niehaus v. Kansas Bar Ass'n,* 793 F.2d 1159, 1164-65 (10th Cir. 1986); *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992). Properly filed objections resolved by the district court are a prerequisite to our review of a magistrate judge's order under § 636(b)(1)(A). *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Boyd Motors, Inc. v. Employers Ins. of Wausau,* 880 F.2d 270, 271 (10th Cir. 1989) (per curiam); *Niehaus,* 793 F.2d at 1165. Because the district court has not yet ruled upon Mr. Hutchinson's objections, we remand this issue to the district court for such a ruling.

The second issue upon which the district court has not yet ruled pertains to a protective order which was placed upon materials produced by Sona Johnston, a nonparty witness in this matter, as well as on her deposition. The magistrate judge granted in part Mr. Hutchinson's motion to modify the protective order and denied the motion in part. As required by 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a), Mr. Hutchinson sought reconsideration by the district court of the magistrate's order. The district court did not, however, rule on Mr. Hutchinson's objections before it granted summary judgment in favor of the Defendants. The modification of the protective order is a matter collateral to the substantive issues in this litigation. *Cf. United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990) (order denying modification of a protective order requested by parties who intervened solely to obtain modification of the protective order was appealable as a collateral order), *cert. denied*, 498 U.S. 1073 (1991); *id.* at 1427 ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed."). Because the district court did not rule on Mr. Hutchinson's objections, we do not reach the issue and instead remand to the district court for such a ruling.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED. The action is REMANDED for further proceedings by the district court on the Plaintiff's objections to the sanctions imposed on him by the magistrate judge and on the Plaintiff's motion to modify the protective order.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JUNE 16, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-5097

THOMAS R. HUTCHINSON,

Petitioner.

ORDER

Before EBEL, McWILLIAMS, and KELLY, Circuit Judges.

Petitioner Thomas R. Hutchinson has filed a petition for writ of mandamus, seeking relief from this panel's decision on his appeal in *Hutchinson v. Pfeil.* 105 F.3d 562 (10th Cir. 1997). The panel construes his mandamus petition as a petition for rehearing of its previous decision. Petitioner previously filed a petition for rehearing, which this panel denied on March 10, 1997. The court will not accept a successive petition for rehearing from any party to an appeal. *See* 10th Cir. R. 40.3. Moreover, the time period for requesting rehearing, with or without en banc consideration, has expired. *See* Fed. R. App. P. 35(c), 40(a).

The petition for rehearing is denied.

Appendix B

Entered for the Court
PATRICK FISHER, Clerk

By s/ illegible
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED AUGUST 4, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #141) of the Defendants Richard Pfeil and Mary Jo Pfeil ("the Pfeils").

Thomas Hutchinson brings this action claiming that he has an undivided one-third interest in and title to the painting "Summer Hillside" by Theodore Robinson. He requests partition of the property and an accounting by his cotenants, the Pfeils. Plaintiff alleges that Robinson died in 1896, and that through the laws of intestacy, several of Robinson's works, including "Summer Hillside," passed first to Robinson's brother, Hamline, and then to Hamline's widow, Florence Robinson, and her two daughters, Fonnie Hutchinson and Nellie Terhune. In 1912, Florence Robinson sold "Summer Hillside" and several other Robinson Paintings to William Macbeth.

Appendix C

After successive transfers, in December 1986, the Pfeils acquired "Summer Hillside" at a public auction from Sotheby's in New York City. In this lawsuit, Plaintiff alleges that Florence Robinson lacked the legal capacity to sell "Summer Hillside" to Macbeth in 1912. Plaintiff brings this action as the personal representative of the estate of Robert W. Hutchinson, alleged to be a descendant of Fonnie Hutchinson.

It is undisputed that Hamline died in 1907 and the his collection of Robinson's paintings passed to his wife and two daughters. Florence Robinson had possession of the collection when she sold "Summer Hillside" in 1912. Florence Robinson died in 1927, and her daughters took possession of the remaining paintings. Fonnie Hutchinson died in 1945, and her interest passed to her two heirs: her husband, Harry Hutchinson, and her son, Robert Hutchinson. When Harry Hutchinson died in 1948, his interest passed to Robert Hutchinson.

Defendants filed a motion for summary judgment, asserting that Plaintiff's claim is based on speculation and guesswork, and is barred by laches, the statute of limitations, or the doctrine of collateral estoppel. Defendants also urge that plaintiffs are equitably estopped from claiming an interest in "Summer Hillside."

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Windon*

Appendix C

Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

Defendants argue that Plaintiff's claim is barred by both the statute of limitations and laches. Defendants assert that Oklahoma law controls this issue, and that the two year limitation pertaining to "an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property" is applicable. Okla.Stat.tit.12, §95 (third). Defendants argue that the statute of limitations would begin to run when the injured party (here, Plaintiff or the person from whom he acquired his interest) knows, or in the exercise of due diligence, should have known of the injury. Thus, the action would accrue when Fonnie Hutchinson (from whom Plaintiff acquired an interest) either knew or should have known of the sale of the painting by Florence Robinson.

Appendix C

With respect to laches, Defendants argue that they are able to demonstrate both elements of this defense: 1) an inexcusable delay in instituting suit, and (2) prejudice or injury to the defendant as a result of the inexcusable delay. *See Brunswick Corp v. Spinit Reel Co.*, 832 F.2d 513 (10th Cir. 1987). Defendants argue that the inexcusable delay comes from the fact that Fonnie Hutchinson was aware of the painting since 1907, and allowed it to remain in the possession of her mother. Defendants claim prejudice from the fact that witnesses who would have personal knowledge of the transaction at issue are deceased and from the fact of economic damage by virtue of their purchase of "Summer Hillside."

Plaintiff argues that neither the statute of limitations nor laches would bar an action by one cotenant against another cotenant until actual ouster by the cotenant or some act amounting to a total denial of the rights of the latter and until notice or knowledge of the ouster is brought home to him. *Bevan v. Shelton*, 469 P.2d 245, 249-50 (Okla. 1970).

> A cotenant must have actual notice or knowledge that his rights are being disputed before the statute of limitations will begin to run against him, or the acts or conduct relied upon to establish a denial or repudiation of a cotenants rights must be so inconsistent with his rights that he reasonably should inquire into the status of his interest in the property.

Tatum v. Jones, 491 P.2d 283, 285 (Okra. 1971).

> The notice or knowledge required must be either actual, or act or acts relied on as an

> ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseized cotenant on inquiry, which, if diligently pursued, will lead to notice or knowledge of the fact.

Preston v. Preston, 207 P.2d 313, 319 (Okla. 1949) (citing *Beaver v. Wilson*, 117 Okl. 68, 245 P. 34, 35 (1926)). Plaintiff specifically notes that possession by one cotenant is not inconsistent with another cotenant's rights. *Daugherty v. Breeding*, 553 S.W.2d 299 (Ky 1977).

Plaintiff's statement of the law is correct. However, the *Beaver* court specifically noted that "[i]n *Beall v McMenemy*, 88 N.W. 134, 63 Neb. 70, 93 Am. St. Rep. 427, it held that a sale of land by one cotenant while in sole possession, followed by the exclusive possession by his grantee for 14 years, constitutes an ouster of the other cotenant, and completes the bar of the statue of limitations against him." Moreover, in *Daugherty*, the Court noted that the statute of limitations would begin to run when the property was removed from the cotenant's possession. *Id.*

Pursuant to these authorities, the Court finds that Plaintiff's claim in this case is barred by the Statute of Limitations and Laches.[1] Florence Robinson did not have possession of "Summer Hillside" as of 1912. Moreover, her grantee or subsequent purchasers have had sole possession of the painting since that

1. While collateral estoppel is not the basis for summary judgment in this case, the Court notes that Plaintiff's similar claims with regard to other paintings by Theodore Robinson were held to be barred by the doctrine of laches in a related case in Evansville Indiana.

time. Certainly the fact that she no longer had possession was sufficient to put the cotenants on notice that their ownership was being disputed. Even if notice was not sufficient at that time, after Florence Robinson died, Fonnie Hutchinson was entitled to possession of the paintings and could have determined that "Summer Hillside" was missing.[2] Sufficient time has passed since those events to find that the statue of limitations has run and that there has been "an inexcusable delay in bringing suit." Moreover, Defendants arguments regarding prejudice are not mere "conclusory statements" but are borne out by the totality of the evidence presented by both sides. The documentary evidence is clearly inconclusive, and prejudice results from the unavailability of key witnesses.

Defendants' motion for summary judgment is granted.

IT IS SO ORDERED THIS 3rd DAY OF AUGUST, 1995

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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2. Plaintiff also argues that the statute of limitations would be tolled by the concealment of William MacBeth, who purchased the painting, and John I.H. Baur, who published a catalogue of Robinson's works in 1947. The "concealment" comes from the fact that the catalogue by Baur does not reveal Florence Robinson as having sold "Summer Hillside" to MacBeth Galleries. This "concealment" argument ignores the fact that Fonnie Hutchinson had access to the paintings while they were in the possession of her mother and sister and could have determined at that time whether "Summer Hillside" was missing.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-5031

THOMAS R. HUTCHINSON,

Plaintiff - Appellant,

v.

RICHARD B. PFEIL and MARY JOAN PFEIL,

Defendants - Appellees,

SONA JOHNSTON,

Amicus Curiae.

ORDER

Filed March 10, 1997

Before **EBEL**, **McWILLLIAMS**, and **KELLY**, Circuit Judges.

This matter comes on for consideration of the appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Appendix D

Entered for the Court

PATRICK FISHER, Clerk of Court

by: s/ Ardell Schuler
Deputy Clerk

APPENDIX E — NOTICE FROM THE CLERK OF THE SUPREME COURT AFFIRMING THE APPLICATION FOR EXTENSION OF TIME DATED MAY 23, 1997

WILLIAM K. SUTER
Clerk Of The Court

AREA CODE 202
479-3011

May 23, 1997

Mr. Glenn R. Beustring
2624 East 21st Street
Suite 1
Tulsa, OK 74114

Re: Thomas R. Hutchinson, Personal Representative of the Estate of Robert W. Hutchinson, Deceased v. Richard B. Pfeil, et ux. Application No. A-849

Dear Mr. Beustring:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on May 23, 1997, extended the time to and including August 7, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: s/ Ruth Jones

Ruth Jones
Assistant Clerk

APPENDIX F — RULES INVOLVED

Federal Rules of Appellate Procedure:

Rule 2. Suspension of Rules

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise proved in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 35. Determination of Causes by the Court in Banc

> *(a) When Hearing or Rehearing in Banc Will be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.
>
> *(b) Suggestion of a Party for Hearing or Rehearing in Banc.* A party may suggest the appropriateness of a hearing or rehearing in banc. . . . The clerk shall transmit any such suggestion to the members of the panel and

the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such suggestion made by a party.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content, Answer; Action by Court if Granted.* A petition for rehearing may be filed within 14 days after entry of judgment. . . . The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Appendix F

Rules of the United States Court of Appeals for the Tenth Circuit:

Rule 2.1. Suspension of local rules

> In the interest of expediting decision, or for other good cause shown, the court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 35.1. En Banc consideration

> A suggestion for en banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court an issue of exceptional public importance or a panel decision that allegedly conflicts with precedent of the Supreme Court of the United States or of the United States Court of Appeals for the Tenth Circuit. . . .

Rule 35.3. Untimely suggestion

> Untimely en banc suggestions will be transmitted to the full court only upon express order of the hearing panel.

Appendix F

Rule 35.5. Who may vote

Hearing or rehearing en banc may be ordered by a majority of the judges of this court who are in regular active service and not disqualified in the particular case or controversy. The panel for hearing or rehearing a case en banc consists of the judges of this court who are in regular active service at the time of hearing or rehearing and not disqualified in the particular case or controversy and any senior circuit judge who sat on the original hearing unless such senior circuit judge elects not to sit on the rehearing en banc.

Rule 40.1. Grounds for petition

A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court. If a petition for rehearing is found to be wholly without merit, vexatious or filed for delay, the court may tax a sum not exceeding $ 500.00. At the court's order, counsel may be required personally to pay these costs to the opposing party. *See* 28 U.S.C. § 1927.

Rule 40.3. Successive petitions

The court will accept only one petition for rehearing from any party to an appeal and,

regardless of the nature or substance of the motion, will not accept any motion to reconsider the court's ruling on a petition for rehearing.